In forma pauperis
Petition not printed

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 775.

MRS. LENA MAE DAVIS, as administratrix of the Estate of Jasper Bennett Davis, Deceased, *Petitioner,*

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY, a corporation, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

SIDNEY S. ALDERMAN,
J. T. STOKELY,
H. G. HEDRICK,
Counsel for Respondent.

S. R. PRINCE,
Of Counsel.

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STATEMENT OF CASE.

This is a suit by petitioner begun in the Circuit Court of Jefferson County, Alabama, on February 13, 1942, to recover damages for the death of her intestate, Jasper Bennett Davis, on August 26, 1941. The suit was brought under the Federal Employers' Liability Act. Issues of negligence of the respondent and damages were submitted to a jury, after motion for a general charge by respondent was overruled. The issues were answered for petitioner, resulting in a judgment for $30,000.00. Motion for a new trial was made, which was overruled by the trial judge.

Respondent appealed to the Supreme Court of Alabama and on June 22, 1944, the judgment was reversed on the ground that there was no evidence of negligence to be sub-

mitted to the jury and the cause was *remanded, under the statutory provisions of the State of Alabama.* The decision of the Alabama court was unanimous. A motion for rehearing was overruled and disallowed on July 25, 1944.

OPINION BELOW.

The opinion of the Supreme Court of Alabama is not yet officially reported. It will be found in 18 So. (2d) 737 and a copy of it is made an Appendix to this brief.

POSITIONS OF RESPONDENT.

First Position—That this Court is Without Jurisdiction to Review this Case by Certiorari.

Second Position—If the Court Has Jurisdiction, the Petitioner Has Presented No Such Case as Would Warrant the Exercise of the Court's Discretion Under Rule 38, 5 (a) to Review the Decision of the Alabama Court.

Third Position—If the Court Holds that It Has Jurisdiction, the Petition is Insufficient, Upon Its Merits, to Justify Its Granting.

We shall discuss the three positions of the respondent in numerical order.

First Position—That this Court is Without Jurisdiction to Review this Case by Certiorari.

It will be noted that petitioner poses as her question 2, of THE QUESTIONS PRESENTED (page 13 of Petition), whether this Court has certiorari jurisdiction of this case. The question raised and discussed by petitioner includes the assumption that the Court's jurisdiction depends on the finality of the judgment, as contemplated by Section 237(b), Judicial Code (28 U. S. C. Section 344). Undoubtedly, under that statute this Court does not have jurisdiction, if

the decision of the court below is not a final judgment. We shall consider this phase of the jurisdictional question, upon the assumption that if the decision of the court below is not a final judgment, this Court is without jurisdiction.

We think, in view of (1) the record in this case, (2) the provisions of the Code of Alabama, (3) the procedure in Alabama Courts, pursuant to code provisions, and (4) the decisions of this Court, that the decision of the court below, in the instant case, is not a final judgment.

The Record Reveals That the Court Below Remanded the Case for Further Proceedings.

It appears at the end of the opinion of the court below (Appendix page 27) that this case was "*Reversed and remanded*" (emphasis supplied). The Certificate of Reversal (Exhibit "C" of Petition) recites, "that said judgment of said Circuit Court is reversed and annulled, *and the cause is remanded for further proceedings therein (emphasis supplied);* and that it is further considered that appellee pay costs accruing on said appeal in this Court and in the court below."

The Court Below Chose Not to Render a Final Judgment.

Code of Alabama, 1940, T. 7, Section 810, provides:

> "Judgment or Decree, if Reversed, May be Rendered, or Cause Remanded.—The appellate court may, upon the reversal of any judgment or decree, remand the same for further proceedings, or render such judgment or decree as the court below should have rendered, when the record enables it to do so."

Under the foregoing code provisions the court below, upon the reversal of any judgment or decree, may do one of two things, (1) render a final judgment, when the record enables it to do so, or (2) remand the cause for further proceedings.

The court below, with its choice of judicial action, under the above statute, having remanded this case to the Circuit Court for further proceedings, has completely answered the question of jurisdiction against the petitioner. Obviously, the decision of the court below is not a final judgment, because the court below, as the record reveals, chose not to render a final judgment, but to remand the case to the Circuit Court for further proceedings. Since the court below held, as it unquestionably did, that the case should be remanded for further proceedings, and thus in effect declined to render a final judgment, the decision below, by its very terms, is not a final judgment, and therefore this Court is without jurisdiction.

While it seems to us that it is unnecessary to look beyond the decision of the court below, it may be well to call to the attention of this Court the fact that there is no statute in Alabama which vests in the Circuit Court, following an appeal to the Supreme Court, the power to make any disposition of a cause, except under the direction of the Supreme Court, pursuant to the statute here referred to. That is to say, there is no statute in Alabama which provides, as do statutes in some states, that upon the decision of the Alabama Court, the trial court shall ministerially enter a judgment in accordance with the decision of the appellate court. In the absence of such statute, no power rests in the Circuit Court to make any disposition of the case other than to try it over, under the well established practice in Alabama.

Causes Reversed and Remanded.

Aside from the fact that the record in the instant case discloses, on its face, that the decision of the court below was not a final judgment, subject to review by this Court, there is a long and unbroken line of decisions of this Court, holding that this Court must decline jurisdiction in cases reversed and remanded. Some of those decisions are collected and cited in 28 U. S. C. Section 344, on page 218.

Test Applied by United States Supreme Court in Determining Jurisdiction.

The test, as applied by this Court, in determining its jurisdiction in the review of causes by certiorari, is whether the record shows that the judgment of the court below is in fact a final judgment. There are innumerable cases to this effect which we could cite, but we shall call attention to only one comparatively recent case.

In *Department of Banking* v. *Pink*, 317 U. S. 264, 268, the Court said:

> "For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final (*Wick* v. *Superior Court*, 278 U. S. 575; *Cheltenham & Abington Sewerage Co.* v. *Pennsylvania Public Utility Comm'n*, *post*, p. 588), but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court (see *Gorman* v. *Washington University*, 316 U. S. 98)."

We also call attention to 10 Cyclopedia of Federal Procedure, 2 ed., Section 4976, in which it is stated:

> "It is the general rule that to give a state judgment or decree the requisite finality under the statute it must terminate the litigation between the parties on the merits of the case, so that, if there should be an affirmance in the Supreme Court, the court below would have nothing to do but to execute the judgment or decree it had already rendered; and that a judgment or decree of the highest state court which leaves the case open for further proceedings or a continuation of the litigation below is not final so as to be reviewable by the Supreme Court, even though the state judgment sought to be reviewed determines the ultimate rights of the parties."

The burden of showing jurisdiction necessarily rests upon the petitioner. The petitioner has not only failed to show that the decision of the court below was a final judgment,

but she has brought here a record which shows conclusively that the decision is not a final judgment, and therefore the court has no jurisdiction.

The petitioner has made two contentions in support of the finality of the decision below. They are : (1) that the decision of the court below was the law of the case, and (2) that the taxing of the costs by the court below indicates that its decision is a final judgment. While, on the face of the record, it does not seem that either contention (1) or (2) has any merit, we think those contentions are completely answered by reference to applicable Alabama statutes.

With reference to petitioner's contention (1), we refer to T. 13, Section 28, Code of Alabama, 1940, which is as follows:

> "Opinion Not Conclusive Upon Second Appeal; Qualification.—The supreme court, in deciding each case when there is a conflict between its existing opinion and any former ruling in the case, must be governed by what, in its opinion at that time is law, without any regard to such former ruling on the law by it; but the right of third persons, acquired on the faith of the former ruling, shall not be defeated or interfered with by or on account of any subsequent ruling."

Obviously, when this case is tried again, if there is an appeal, the court below would not be bound by its present decision. *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 213 U. S. 207.

In regard to petitioner's contention (2), we refer to T. 7, Section 276, Code of Alabama, 1940, which, in part, provides:

> "New Trial, Causes For.—On motion filed within thirty days from entry of judgment a new trial may be granted in the following causes: (Inapplicable causes omitted.)
>
> "Error of law occurring at the trial and excepted to by the party making the application. And the court,

> in granting new trials, may allow the same at the costs of the party applying therefor, or in the costs abiding the event of the suit, or a portion of the costs, as the justice and equity of the case may require, taking into consideration the causes which may make such new trial necessary."

Clearly, the taxing of costs by the court below was simply incidental to the granting of a new trial, as provided by statute.

In conclusion, it seems to us that the petition must fail for lack of jurisdiction, in that the record in this case, does not disclose that the decision of the court below has ended this litigation, but to the contrary, it positively appears in the face of the opinion, and in the certificate of reversal, that the case was remanded to the Circuit Court for further proceedings, and that therefore, this Court is without jurisdiction to review the case.

Second Position—If the Court Has Jurisdiction, the Petitioner Has Presented No Such Case as Would Warrant the Exercise of the Court's Discretion Under Rule 38, 5 (a) to Review the Decision of the Alabama Court.

If the Court should hold that it has certiorari jurisdiction of this case, the respondent contends that petitioner has shown no such case as would warrant the exercise by this Court of its judicial discretion under Rule 38, 5 (a), inasmuch as there do not exist in this record any special and important reasons for granting the writ. This is an ordinary case involving the usual questions in a tort action: whether the evidence was sufficient to justify submission of the case to a jury or called for direction of a verdict for respondent, under well settled rules of law—the kind of case as to which it is contemplated that ordinarily the court below shall be the court of last resort.

Where, as here, the case simply involves an appreciation of all of the facts and admissible inferences, for the purposes of determining whether there were matters for the

consideration of the jury, and if this Court can not say that manifest or palpable error was committed, the decision of the state court will not be disturbed. *Great Northern R. Co.* v. *Knapp,* 240 U. S. 464; *Erie R. Co.* v. *Welsh,* 242 U. S. 303.

It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided, or that judgment as rendered could not have been given without deciding a federal question. *Lynch* v. *New York,* 293 U. S. 52; *Southwestern Bell Tel. Co.* v. *Oklahoma,* 303 U. S. 206.

Third Position—If the Court Holds that It Has Jurisdiction, the Petition is Insufficient, Upon Its Merits, to Justify Its Granting.

Whether or not the petitioner is entitled to a review of the Alabama court's decision, even if the judgment below is final and this Court has jurisdiction, will be determined by the legal significance of the material facts in this case. As it seems to us, the petitioner's statement of the facts is neither full enough nor clear enough to give this Court a full appreciation of the facts. It is our view that the Supreme Court of Alabama has given a full, clear and fair statement of the facts, as such facts are revealed in the transcript, and rather than undertake to give our own version of the facts, we beg to refer the Court to the Alabama court's decision, a copy of which is attached to this brief, as an appendix. However, we respectfully call to the Court's attention photographs of the track layout on pages 37, 41, 45, 49, 53 and 57 of the Transcript of Record, which we think will be helpful, as illustrating the testimony of the several witnesses.

Grounds on Which Petitioner Contends Petition Should be Allowed.

As the opinion of the court below readily reveals, the court's decision turned on the single point that the undisputed evidence in this case having disclosed that the railroad gave the signal, as provided by its operating rules, of the train movement in connection with which the plaintiff's intestate is alleged to have sustained his fatal injury, there was no sufficient evidence, under the authority of this Court's decisions, to have justified the trial court in the submission of the case to the jury, upon the issue of the railroad's negligence.

The petitioner does not contend that the railroad failed to give timely signal, as provided by the railroad's operating rules, of the intended movement of the train, in connection with which the plaintiff's intestate is alleged to have sustained his injury. The petitioner bases her application for this Court's review of the decision of the court below solely on the ground that that court failed to recognize certain evidence in the case as being material upon the issue of the railroad's negligence. In that situation, we deem it sufficient simply to refer to that evidence and briefly point out the obvious immateriality of such evidence upon the issue of the railroad's negligence.

After a careful study of the petition, we think it may be fairly stated here that the total effect of the contentions made by the petitioner, with respect to evidence which the Alabama court failed to recognize as being material upon the issue of the railroad's negligence, may be summarized and stated as follows:

(1) That it was the original plan of the conductor to park his train on the south main line, of which plaintiff's intestate had notice, but that the conductor, without notice to the plaintiff's intestate, altered that plan by deciding to move the train southward on the parallel north main line, at some point south of the switch point of the cross-over, and that the facts and circumstances attending the execu-

tion of the plans, as altered, were material on the issue of negligence; and

(2) That prior to the movement of the train, in connection with which the plaintiff's intestate is alleged to have sustained his injury, there was a conflict of evidence with respect (a) to the significance of a back-up signal given by Atkinson, the swing brakeman, which was intended for plaintiff's intestate to relay to the engineer, and (b) to the significance of certain blasts of the whistle by the engineer, in calling for signals immediately prior to the time the engineer gave the signal for the back-up movement of the train, and that such conflicts of testimony, with respect to the significance of antecedent signals given by Atkinson and by the engineer, constituted material evidence upon the issue of the railroad's negligence.

We propose to discuss as briefly as we can all the principal contentions of petitioner under the heading, "Grounds on Which Petitioner Contends Petition Should Be Allowed" in the above divisions of (1) and (2), and also to discuss any other contention that may not fall under such divisions. We shall discuss division (1) under the heading "Evidence With Respect to Change of Plans Was Immaterial," and division (2) under the heading "Evidence With Respect to Signals Given Prior to Back-Up Signal Given by Engineer Was Immaterial." In interest of clarity, we shall hereafter refer to plaintiff's intestate as "Davis."

Evidence With Respect to Change of Plans Was Immaterial.

It is interesting to note that the opinion of the court below has, as we think, effectively answered the contentions the petitioner now makes with respect to the materiality of the evidence as to any change of plans by Conductor Cagle. On pages 741-742 of the opinion, the court below said:

> "If we assume that Davis had information obtained sometime previously that the train would be parked on the southbound track, and would not therefore back

down the northbound track beyond the cross-over switch, he also knew that the operation was under the control of Cagle, the conductor, who could change his plans. And if he did so it was not necessary to hunt up Davis personally and so advise him, if the ordinary signals were given to that end, and they were reasonably sufficient. The lantern signal to that effect was given him several times to relay to the engineer according to custom as well as a hallooing of it by Atkinson, and then the back up signal was given by the engineer who had caught the lantern signal; all at a time when they knew that Davis' duties did not then put him in danger from such a movement, and knew that the engineer, twenty-three cars beyond Davis, had caught the lantern signal. It was a warning to stay out of danger from a back up. If Davis did not catch the signals given by Atkinson, there is no reason to find that signal given by the engineer was not sufficient warning to him. If Davis did not hear it on account of the noise of the southbound train, the other trainmen had no way of knowing that. This same southbound train was then passing Atkinson and Cagle also, and had the same tendency to obstruct their hearing, but they did hear it. Why should it not be sufficient for Davis?"

While the above quoted excerpt from the Alabama court's opinion should be sufficient to dispose of the contention that any change of plans was material, we think, in view of some of the contentions of the petitioner, as contained on pages 5, 6 and 7 of the petition, that we should refer to the record and briefly discuss the pertinent testimony and the contentions of the petitioner.

It is contended by the petitioner that when Conductor Cagle changed his plan from the parking of the train on the south main line to that of parking on the north main line, the duty devolved upon the conductor to advise Davis of such change in plans. The petitioner intimates, if she does not positively state it, that the purpose of advising Davis of the change of plans was to protect Davis. It is respectfully submitted that the record in this case will not support the contention that there was any duty on the part of the conductor to notify Davis of any change of plans,

or that any notice communicated to Davis of the change of plans was intended for the protection of Davis. The petitioner refers this Court to the testimony of Conductor Cagle on page 26 of the Record in support of her contentions. If that statement of the conductor is examined in its context and in the light of the testimony of swing brakeman Atkinson, it will be clear that the effect of the conductor's statement was that while it was customary for swing brakeman Atkinson to communicate any change of plans to head brakeman Davis, that practice was neither required nor necessary, and that the only purpose of the communication of information as to change of plans to Davis was for Davis to relay that information to the engineer, in order that the engineer could execute the conductor's directions in making a back-up movement of the train.

Nowhere in this record may we find facts to support any contention that there was any duty imposed on the conductor to give head brakeman Davis any notice of any change of plans or to communicate any information with respect to change of plans to Davis for the purpose of protecting Davis against any train movement. To the contrary, the "little back-up signal" of swing brakeman Atkinson, which was intended for head brakeman Davis, was ultimately a signal to the engineer to back up the train. It was not the duty of the conductor, personally, or through swing brakeman Atkinson, to give any signal to notify head brakeman Davis of any danger incident to the back-up movement of the train, because that duty rested solely upon the engineer, who was required to give to all trainmen, including Davis, notice of the back-up movement of the train, in response to the back-up signal which originated with the conductor, and which might have passed through Davis, had he been attentive at his post of duty on the night of his injury and death.

For some reason, unfortunately, Davis was not attentive at his post of duty. He apparently failed to heed the engineer's back-up signal, which was designed for his protection and the protection of the rest of the crew, and which was heard by all other trainmen involved. The court below, in

referring to any duty imposed on the railroad to give Davis notice of the movement of the train, on page 741, said:

> "We do not interpret that to mean that any such specific duty was owing Davis on this occasion, if the engineer's back up signal was in performance of his duty as to warning him and all the trainmen of such intended movement, and at a time when Davis was apparently out of danger.
>
> "If Davis did not catch the Atkinson lantern signal and his verbal warning, the engineer's back up signal warning of the movement was in all respects sufficient even though no signal had been given him by Davis as to which there is a conflict. No other notice to Davis was required by the rules of the company when he was not in a position of danger from the movement, and the trainmen knew it, and the circumstances did not suggest a change of his position to one of danger which should be noted by the other crewmen. In this respect it is different from *Tennant* v. *Peoria & P. U. Ry. Co.*, supra, where no warning signal was given."

The petitioner contends that the movement in response to the decision to let the train wait on the north main line was an "unusual one." But even if we assume it was unusual, and that Davis had no prior knowledge of the conductor's intention to move the train on the north main line, such unusual location of the train, and Davis' lack of knowledge that the train would be moved there, would not relieve Davis of the duty of respecting the signal given by the engineer of the movement of the train.

Evidence With Respect to Signals Given Prior to Back-Up Signal Given by Engineer Was Immaterial.

Shortly before the movement of the train, in connection with which Davis sustained his fatal injuries, the train stood on the north main line, ready for a back-up movement. Whether the movement should be over the crossover to the south main line or backward on the north main line, the only duty imposed on the railroad, in so far as its employees were concerned was to give notice of the back-up movement, by whistle signal. Such notice, under the rules

of the railroad, consisted of three blasts of the whistle by the engineer. If that notice was given, and no one questions the fact that it was given, it is wholly immaterial how, or by whom, the request for the back-up movement was communicated to the engineer. The important question was whether the proper back-up signal was given by the engineer. The question how, or by whom, the engineer was requested to back-up the train is not important. In that connection the opinion of the court below, on page 741, said:

> "The important circumstance was that the engineer gave the back up signal by his three short blasts, although sometimes he might not have understood such a small signal from that distance. But it is undisputed that his three shorts showed that he had a back up in mind. There is no evidence tending to show that the engineer should not act on the little signal if he caught and understood it and gave his indication of that fact by his three shorts."

It is true Atkinson, the swing brakeman, intended his signal, calling for a back-up movement, for the head brakeman, Davis, but that signal was not given by Atkinson to Davis for the purpose of warning Davis of danger, but for Davis to inform the engineer that a back-up movement was required. While the evidence does not reveal that Davis acknowledged the receipt of the signal from Atkinson, all of the evidence points unmistakably to the conclusion that Davis either received the signal or knew what the movement of the train should be, because the engineer testified in answer to plaintiff's interrogatories that Davis gave him the back-up signal (Petitioner's Brief, Page 19). However, if the engineer got the signal and acted upon it, by giving a signal of his back-up movement, as he unquestionably did, it could make no difference whether the signal came through Davis or whether the engineer received it directly from Atkinson. Incidentally, we are considering two separate kinds of signals, (1) a signal to the engineer telling him to back-up his train, and (2) a signal by the engineer to the trainmen, notifying them that he was about

to back-up his train. If the engineer received the back-up signal and properly acted upon it by giving the signal for the back-up movement of the train, it could make no possible difference whether the previous back-up signal to him was a "little back-up signal," or a "wide open circular signal," and it would certainly make no difference whether the signal was transmitted through Davis or came directly from Atkinson. So any evidence in the record with respect to such antecedent signals, whether in conflict or not, could have no possible bearing on the issue of negligence. In respect to that the Opinion below, said, at p. 741:

> "But the engineer gave the proper and only required back up signal. Whether or not the signal given him was as wide open as is customary when intended for him to act on it, the only question is whether he recognized it as a back up signal and indicated it by his three shorts."

The same observations are equally applicable to the blasts made by the engineer, prior to the signal given for the back-up movement, when he was requesting a signal for the movement of the train. There is no evidence in the record that any trainman was confused by the engineer's whistle blasts. Davis was a trainman of experience, and if other trainmen who testified as to the significance of these signals, understood their meaning, it must be assumed that Davis likewise understood them.

There is one critical fact in this case, which, when considered by the Alabama court and when now considered by this Court, definitely rules out the petitioner's contention as to the materiality of the evidence with respect to any change of plans and with respect to all signals given prior to the back-up signal of the engineer. That fact is that, prior to the movement of the train that resulted in the fatal injury to Davis, the respondent, through its engineer, gave Davis a timely notice of such movement by the signal provided in the operating rules of the railroad. Regardless of what information Davis may have had as to the ultimate location of the train, and regardless of what signals

had preceded the back-up signal given by the engineer, Davis had no more right to disregard that signal than the railroad had the right to fail to give it. There is nothing in the record to support any contention that anything the respondent did or failed to do should or could have relieved Davis of the duty of respecting and responding to the engineer's signal.

The petitioner calls attention to some evidence to the effect that the back-up signal may mean either that the engineer is backing up or that he is letting the trainmen know that he wanted to back up. The petitioner says that if Davis heard the back-up signal, or if there was evidence from which it may be inferred that he heard such signal, and the signal has two meanings, it should be a question for the jury to determine what it meant to Davis at the time and under the circumstances. The petitioner does not tell us in what way, or under what circumstances, any two meanings of the signals could have confused Davis, but the answer to that contention was given by the court below at page 741 of the Opinion below, when it said:

> "But whether the engineer's three shorts was a back up signal or to indicate he wanted to back up, it was enough to put Davis on notice to look out for a back up, and to stay out of danger, for his duties did not call for him to be in a position of danger."

TENNANT v. PEORIA & PEKIN UNION RY. CO., 321 U. S. 29, DISTINGUISHED.

The petitioner cites the *Tennant* case in support of her contention that the Alabama court erred in reversing the trial court, for that there was sufficient evidence to submit the case to the jury. However, the lower court in the *Tennant* case was reversed by this Court, because the evidence disclosed that the railroad in that case failed to give a signal of the movement of its train, in violation of a rule *similar to the rule which was observed by the respondent in the instant case.*

The Alabama court, on page 741 of its Opinion, said:

> "It is not the duty of the company to show just how he met his death or what he was doing. He could have attempted to catch the moving train and slipped under it. A presumption against his negligence will be indulged, *Tennant* v. *Peoria and P. U. Rwy. Co.*, supra; but the same presumption applies to other trainmen, *Atlantic Coast L. R.R. Company* v. *Wetherington*, Ala. Sup., 16 So. (2d) 720 (11)."

We do not think, and we shall therefore not concede, that this Court, in any case cited by the petitioner, or in any case with which we are familiar, has set up any new standard of care required of railroads in the application of the Federal Employers' Liability Act. This Court has consistently held that the Federal Employers' Liability Act must be construed in the light of the common law. The operating rules of the railroad are designed primarily to protect life and limb of its employees, and its own property. While the courts are not bound by these rules, they are usually recognized by the courts as fixing standards of care. In the instant case, as in the *Tennant* case, the railroad was required to give a signal of the movement of the train and we assume that that rule is a proper measure of due care, under the circumstances. Of course the railroad is not charged with the necessity of actually communicating to its employees signals which have been properly given. If because of inattention, or for other reasons, an employee does not receive a proper signal, the railroad could not be made responsible for the consequences. This must be so, because if railroads are held to the duty of absolutely communicating all signals to employees, they may as well abandon all operations by signals and confine operations to such train movements as may be made by personal communications among crew men.

The case in its material aspects comes down to this. When the engineer gave the back-up signal, Davis was eight or ten car-lengths nearer the engine and the engine whistle

than Cagle and Atkinson. They heard the back-up signal. They were subject to all the conflicting noise of the train on the other track, as was Davis. There is no possible reason why Davis should not have heard the signal which Cagle and Atkinson heard. As to this, the court below said (p. 742):

> "The only question is whether proper signals were given of the intended movement. Davis was eight or ten car lengths nearer the engineer and to the engine whistle than Cagle and Atkinson, and they heard it with no better opportunity, and no one testified that it was not given in a way well understood by all trainmen. The situation simply shows a regretable incident for which the defendant is not responsible, since its duty to Davis was fully discharged."

This case is squarely distinguishable from the *Tennant* case. In the *Tennant* case the crucial fact was that the signal for the fatal movement was not given. In this case, the crucial fact is that the signal for the fatal movement was given.

CONCLUSION.

It is respectfully contended that the petition should be denied, for that, (1) this Court is without jurisdiction to review the decision of the court below, because it is not a final judgment; (2) if the Court has jurisdiction, the petition presents no such case as would warrant the Court in the exercise of its discretion to review the decision; and (3) a review of the record will reveal no material evidence which could have been properly submitted to a jury.

Respectfully submitted,

SIDNEY S. ALDERMAN,
J. T. STOKELY,
H. G. HEDRICK,
Counsel for Respondent.

S. R. PRINCE,
Of Counsel.

APPENDIX.

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

October Term, 1943-44.

6 Div. 191.

ALABAMA GREAT SOUTHERN RAILROAD CO.

v.

LENA MAE DAVIS, *Adm'r'x.*

APPEAL FROM JEFFERSON CIRCUIT COURT.

FOSTER, Justice.

The question on this appeal is whether there was sufficient evidence of negligence of appellant or any of its employees which proximately caused the death of plaintiff's intestate (Davis) under the Employers' Liability Act of Congress.—45 U. S. C. A. sections 51, *et seq.* That question does not involve contributory negligence by decedent. If there was sufficient evidence of appellant's negligence, decedent's contributory negligence would be material for certain purposes. But decedent's conduct on that occasion is material to determine whether appellant or its employees were negligent proximately causing his death.

Davis, the decedent, was what was termed head brakeman on a freight train. That meant that his principal duties were toward the front end of the train. The swing brakeman was toward the back end, and the flagman protected the back end and coupled and switched as needed. The conductor had control of the train. The engineer obeyed his directions and observed signals.

The train was on a trip north toward Birmingham from Bessemer on the east main of a double track, and passed

Phoenixville, a station near a cement plant which was north of it and west of the railroad tracks of appellant. The west main was used for the southbound travel which we will call the south main, and the east for north travel, which we will call the north main. The train had switching to do at the plant. To get into the plant from the east or north main line, the train had to travel north from Phoenixville to and over a cross-over track from the north to the south main, and down it to a lead track from it to the plant yard. That plant was also served by the Atlanta, Birmingham and Coast Railroad Company whose line was west of the plant and whose engine and crew were at that time switching in its yard, so that appellant's engine and crew had to wait until the service was finished. That was at night. Appellant could not get this entire train of twenty-three cars on it. So that in waiting to get into the cement yard, the train had to wait on the southbound track or the northbound track, as was most convenient. The conductor directed the procedure. He caused the train to pass along the cross-over track to the southbound track and back down that track. That made it the duty of Davis, the decedent, to go forward toward Birmingham, and protect the front from southbound travel. This he did. After waiting three-quarters or an hour a special southbound freight came down. It had been flagged by decedent and he rode down on the engine. The conductor then arranged to move his train to the north track, out of the way. But before doing so discovered a train coming from the south, going north on that track. So he waited for the train to pass. Then decedent lined up the switch on the northbound track for the cross-over, and Atkinson, the swing brakeman, lined it up on the southbound track for the cross-over. The train then made the movement over to the northbound track and passed the switch with its caboose. Then decedent lined up the cross-over switch with the northbound main and crossed that main behind the caboose, and at the same time Atkinson lined it up for the southbound main, and

crossed over also and went down the side path nine or ten car lengths (forty feet each) to where the conductor Cagle was standing. The southbound freight was then moving slowly in its course. Atkinson then asked Cagle what he planned to do. He told Atkinson that he would back down on the northbound track and wait. Another train would be due down the southbound track in about an hour. All the trainmen had a time-table showing that schedule. Atkinson then gave with his lantern a little back up signal to decedent and hallooed to him. This was done two or three times. This signal was intended for Davis, whose lantern showed from the side of the northbound track at the switch which was his post of duty. Davis would ordinarily relay it to the engineer. It is not clear exactly where he was standing. As to that, Cagle testified as follows: "When I noticed Mr. Davis, I saw him go across the switch behind the caboose on the east side. That is the last time I noticed him. As to whether that was his post of duty there on the engineer's side, as we had gotten our train off the south main, he had no reason for being out flagging. His post of duty was there by the switch. The signals were given from the engineer's side. * * * the last time I saw him was when he lined the switch and walked across behind his caboose, if it was him that lined the switch and I suppose it was." And Atkinson testified as follows: "Yes, I saw him walk across. The cabooses have lights on both sides of the back end, known as markers. They are kerosene lamps. I was walking in that little path along by the side of the track as I left Mr. Cagle and started up this way, and I saw that lantern there at that time. It was on the same side of the caboose that I was on, but from just looking I couldn't tell whether he was standing on the track or not. It looked like he was on this side of the track, just looking straight up. When we pass the back up signal, or any kind of signal, every man in the crew does not necessarily have to pass that signal. As to whether under those conditions Davis was supposed to acknowledge my signal, I was pass-

ing my signal to Davis, but after the engineer blew three times, I turned around and started walking on back, because that was from the engineer that he got my signal, and three blasts from him was a back up signal. That meant he was going to back up, but I was giving my signal to J. B. Davis." There was no other evidence of his exact position.

After Atkinson gave this little back up signal two or three times, the engineer gave three short blasts of his whistle. This was his back up signal. It was heard and understood by Atkinson and Cagle about thirty-three car lengths away, and by Barnes, the flagman, about forty-five to fifty car lengths away; whereas Davis was only about twenty-three car lengths away. Atkinson hearing it turned his back and walked away from the direction of Davis toward Cagle. Davis did not acknowledge the signal. The train soon began to back and soon afterwards Davis began to halloo, and Atkinson gave the "wash out" signal, for an immediate stop. He gave it also to the southbound train and stopped it. They went to Davis and found him sitting on the edge of the cross-ties with both legs cut off. The caboose and two coal cars had passed. He was sent in ambulance to the hospital and died that night.

Appellee claims that Davis was not expecting his train to be backed and parked on the north main, and had heard the conversation at Phoenixville that his conductor intended to park it on the south main, but this was always in the discretion of the conductor, dependent upon the respective advantages of each under the particular circumstances.

Atkinson testified that the three short blasts of the whistle was the engineer's back up signal, and the only one he had. That those blasts meant that. That he only heard one such signal from the engineer.

Cagle testified that he did not notice what was the first signal the engineer gave, but that he gave two signals. That the second time he blew a back up signal—three

shorts. Also that a call by the engineer for a signal is four shorts. This witness heard two signals, but did not know how many blasts he gave in the first: then he gave three shorts. The witness then testified: "That means backing up. The purpose of giving that signal is to let you know he wants to back up, and he can blow that after he gets a signal, to let you know he is backing up. The purpose of blowing after he gets the signal is to let you know he is backing up, or to let you know he wants to back up; either one. When the back up signal is sounded it does not mean, in all cases, that he is going to back up his train. It might have meant that he had gotten a back up signal and was fixing to obey it, and let the crew know it." "That rule 16c (referring to rule book shown witness) reads: 'When standing, back the train, three shorts,' and that train was standing and when the engineer blew three shorts like I say it means he was going to back the train; it don't mean necessarily he had gotten a signal. It probably meant he was going to back up at that particular time, but that is not always the case. As to whether that is what I understand it to mean at that time, I suppose that is what he meant, calling for the signal that first time."

We here refer to certain established principles of law in connection with this sort of case not in any respect disputed by counsel. This is done only to illustrate the meaning of the issue and what really is controverted.

The gist of this action is negligence of some sort by the railroad company or some employee of it in the scope of his duty, which proximately caused the death of Davis. There is no presumption of negligence. The evidence to sustain the claim must be of a substantial sort, more than a scintilla, and it cannot be predicated on a conjecture, or a supposition that there might have been negligence which proximately caused it. But the inference of negligence must be from a reasonable and fair interpretation of the evidence; and does not follow because it cannot be said that there was no fair inference that Davis was himself

negligent, nor evidence showing the circumstances of the accident. The defendant has no burden or duty to overcome any presumption of negligence. If the evidence does not fairly show what was the proximate cause of the accident, plaintiff cannot recover. The cases establishing those principles have often been cited and are fixed by the Act itself as interpreted by the Supreme Court of the United States.—*Brady* v. *Southern Rwy. Co.*, 320 U. S. 476, 64 S. Ct. 232; *Tennant* v. *Peoria & P. U. Rwy. Co.*, 321 U. S. 29, 64 S. Ct. 409. We will cite a few of our more recent cases, which cite other federal cases.—*Southern Rwy. Co.* v. *Melton*, 240 Ala. 244, 198 So. 588; *Southern Rwy. Co.* v. *Glenn*, 228 Ala. 563, 154 So. 792; *A. C. L. R. R. Co.* v. *Wetherington*, Ala. Sup., 16 So. (2d) 720.

The question is, as we have stated, whether a fair interpretation of those facts, considered in a light most favorable to Davis, justifies a finding that his death was proximately caused by the negligence of the defendant or one of its servants acting in the scope of his authority.

In the several appeals of the case of *Williams* v. *Mobile & Ohio R. R. Co.*, 219 Ala. 238, 121 So. 722, Id., 221 Ala. 402, 129 So. 60; Id., 224 Ala. 125, 139 So. 337; Id., 226 Ala. 541, 147 So. 819, we sustained a jury finding of negligence under the Federal Employers' Liability Act when the deceased was engaged in checking cars in a string preparatory to its movement out of the yard. The signal for the engineer was given by the yard foreman at the time in charge of the movement when neither he nor the crewmen, nor anyone else, knew where deceased was and no whistle blast was given. He was run over by the cars and killed. But it was his duty to be about those cars, crossing from one side to the other, which could well have put him in danger from such a movement. We said they owed him a duty to take care of his safety, by finding out where he was. This was since no signal of the whistle or bell was given, and though it was only a conjecture as to exactly what deceased was doing and how he got under the cars.

But we said that the crewmen should exercise due care to avoid injurious consequences to an employee who in the discharge of his duties is likely on that account to be in a dangerous place,—citing 39 Corpus Juris 458 (sections 574 and 575: see, *Mobile & Ohio R. Co.* v. *Williams*, 219 Ala. 245, 121 So. 747 [7], and 221 Ala. 407 [2 and 3], 408 [5]), 129 So. at pages 64, 65. This is there said to be on the theory that it is the duty of a railroad company to give reasonable warning of the movements of its trains, cars or locomotives, which are liable to endanger employees working in or about them when standing. This theory is supported by the recent case of *Tennant* v. *Peoria & P. U. Rwy. Co.*, 321 U. S. 29, 64 S. Ct. 409.

In the instant case when Atkinson gave the back up signal, it was directed to Davis, the deceased, who was then apparently standing at his post of duty by the track near the switch, where he was not necessarily in danger by reason of such movement, and his duties did not anticipate any such danger or change of position. The engineer probably caught the signal and responded with three short blasts, indicating either that he was backing up or to let them know that he wanted to back up. There was no evidence of impropriety in doing so, nor the violation of any rule. The important circumstance was that the engineer gave the back up signal by his three short blasts, although sometimes he might not have understood such a small signal from that distance. But it is undisputed that his three shorts showed that he had a back up in mind. There is no evidence tending to show that the engineer *should not* act on the little signal if he caught and understood it and gave his indication of that fact by his three shorts.

The evidence of Cagle relied on by appellee on page 63 of the record is as follows: "As to whether the engineer would have been authorized to move on the signal I saw Mr. Atkinson give, I don't know what he thought about that little bitty signal; it is a question of whether he would want a wider signal."

Rule 84 is also relied on.—"A train must not start until the proper signal is given. A freight train must not pass a station without proceed signal from the conductor." But the engineer gave the proper and only required back up signal. Whether or not the signal given him was as wide open as is customary when intended for him to act on it, the only question is whether he recognized it as a back up signal and indicated it by his three shorts. The evidence which it is claimed means that the lantern signal by Atkinson was owing to Davis, shown on page 31 of the record, is as follows:

> "Q. Let me ask you this, if there is a swing brakeman here (indicating) giving the signal, and a flagman here and a brakeman between the swing brakeman and the engineer, and you are not paying any attention to where this man is, isn't it proper to see that this man knows what the signal is too?
> "A. It might be.
> "Q. Would you give a signal for a train to back up if you didn't know where a trainman was—up here around the caboose?
> "A. No, if I had any idea about where he was——
> "Q. You wouldn't give any signal?
> "A. No, sir.
> "Q. Well, it is important then for the brakeman that would be here near the rear end of the train, around the caboose, to see the signal that was being given from the south?
> "A. Well, he——
> "Q. It is just as important for him to know what it is as the engineer?
> "Mr. Stokely: Object to that.
> The Court: Sustained."

We do not interpret that to mean that any such specific duty was owing Davis on this occasion, if the engineer's back up signal was in performance of his duty as to warning him and all the trainmen of such intended movement, and at a time when Davis was apparently out of danger.

If Davis did not catch the Atkinson lantern signal and his verbal warning, the engineer's back up signal warning of the movement was in all respects sufficient even though no signal had been given him by Davis as to which there is a conflict. No other notice to Davis was required by the rules of the company when he was not in a position of danger from the movement, and the trainmen knew it, and the circumstances did not suggest a change of his position to one of danger which should be noted by the other crewmen. In this respect it is different from *Tennant* v. *Peoria & P. U. Rwy. Co., supra,* where no warning signal was given.

It is not the duty of the company to show just how he met his death or what he was doing. He could have attempted to catch the moving train and slipped under it. A presumption against his negligence will be indulged.—*Tennant* v. *Peoria & P. U. Rwy. Co., supra;* but the same presumption applies to other trainmen,—*A. C. L. R. R. Co.* v. *Wetherington,* Ala. Sup., 16 So. (2d) 720 (11). But whether the engineer's three shorts was a back up signal or to indicate he wanted to back up, it was enough to put Davis on notice to look out for a back up, and to stay out of danger, for his duties did not call for him to be in a position of danger.

If we assume that Davis had information obtained sometime previously that the train would be parked on the southbound track, and would not therefore back down the northbound track beyond the cross-over switch, he also knew that the operation was under the control of Cagle, the conductor, who could change his plans. And if he did so it was not necessary to hunt up Davis personally and so advise him, if the ordinary signals were given to that end, and they were reasonably sufficient. The lantern signal to that effect was given him several times to relay to the engineer according to custom as well as a hallooing of it by Atkinson, and then the back up signal was given by the engineer who had caught the lantern signal: all at a

time when they knew that Davis' duties did not then put him in danger from such a movement, and knew that the engineer, twenty-three cars beyond Davis, had caught the lantern signal. It was a warning to stay out of danger from a back up. If Davis did not catch the signals given by Atkinson, there is no reason to find that the signal given by the engineer was not sufficient warning to him. If Davis did not hear it on account of the noise of the southbound train, the other trainmen had no way of knowing that. This same southbound train was then passing Atkinson and Cagle also, and had the same tendency to obstruct their hearing, but they did hear it. Why should it not be sufficient for Davis?

If Davis put himself on the track behind the train at that time, which we will not assume, he should not have done so after such warnings to him. The engineer's signal was warning to all the trainmen. If he attempted to catch the moving cars and slipped under them, this was not the proximate result of any negligence of the trainmen, so far as the evidence shows. It is difficult to imagine any other cause of his injury.

The only question is whether proper signals were given of the intended movement. Davis was eight or ten car lengths nearer the engineer and to the engine whistle than Cagle and Atkinson, and they heard it with no better opportunity, and no one testified that it was not given in a way well understood by all trainmen. The situation simply shows a regretable incident for which the defendant is not responsible, since its duty to Davis was fully discharged.

The affirmative charge should have been given for the defendant.

Reversed and remanded.

Gardner, C. J., and Thomas and Stakely, JJ., concur.